MAYBAN FINANCE BHD

v.

UMAS SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-90-2000]
15 MAY 2002

CIVIL PROCEDURE: *Writ of summons - Service - Renewal - Whether good reasons shown for renewal - Service on company by way of substituted service - Whether allowable - Whether order for substituted service justly obtained - Mode of service - Whether a matter of plaintiff's discretion - Rules of the High Court 1980, O. 5 r. 6(2), O. 6 rr. 3, 7(2) & (2A), O. 12 r. 1(2), O. 62 rr. 4, 5*

WORDS & PHRASES: *"Person" - Rules of High Court 1980, O. 62 r. 5(1) - Whether to include incorporated company*

This was an application by the first defendant to set aside the order made by the learned senior assistant registrar extending the validity of the plaintiff's writ of summons and permitting substituted service thereof. The facts showed that the plaintiff had made two attempts to serve the writ on the first defendant by way of registered post, but was advised by the postal authorities on both occasions that the latter 'had left' the address. It was also evident that, since the plaintiff had effected service upon the second defendant, who was a director of the first defendant, an attempt was made by the plaintiff, *albeit* unsuccessfully, to let the second defendant's solicitors accept service on behalf of the first defendant. These facts notwithstanding, the first defendant argued that the order for renewal and substituted service hereof ought to be set aside as: (i) the plaintiff had not shown good reasons for renewal in contravention of O. 6 r. 7(2) & (2A) Rules of the High court 1980 ('RHC'); (ii) the plaintiff had not complied with O. 62 rr. 4(1) & 5 of RHC; (iii) there was no necessity to effect service by substituted service as the plaintiff needed only to leave a copy of the writ at the registered office of the first defendant; and (iv) substituted service against a company was not provided for in RHC.

Held:

[1] The law allows for at least four modes of service of a writ, namely, by leaving a copy at the registered office, or by sending a copy of it by registered post addressed to the registered office of the company, or by sending it by registered post to the principal office of the company, or by handing a copy of it to the secretary or director or principal officer of the company. A reading of O. 62 r. 4 of RHC and s. 350 of the Companies Act 1965 showed that those provisions regarding the mode of service are alternative to each other. The law has left it entirely to the discretion of a plaintiff to choose which of the modes he prefers to opt for. (p 653 b-c)

[2] The plaintiff, having attempted service twice by a mode authorized by the rules and not succeeding, cannot be said to have needlessly obtained an order for substituted service. As it were, the plaintiff is not obliged to exhaust each and every mode of service before applying for substituted service. (p 653 e, f & g)

[3] The word 'person' in O. 62 r. 5(1) RHC does not only refer to an individual person but refers also to a company or a corporation. That this is so can be gleaned from the use of the word 'person' in O. 6 r. 3 and O. 9 r. 3 of RHC. Further s. 3 of the Interpretation Acts 1948 & 1967 defines 'person' as including 'a body of persons, corporate or unincorporated'. (pp 654 f & 655 a)

[3a] Consequently, the use of the word 'person' in O. 62 r. 5(1) is not indicative of an intention to confine the application of the rule to a natural person only. The object of the sub-rule is to make possible service by an alternative method where it is impracticable to effect service by conventional methods stated in the rule. Hence, in considering whether or not substituted service should be available, it is not the character of the party to be served, namely whether that party is a natural person or an incorporated body, but the impracticability of service that is important. (pp 655 h & 656 a)

[4] Although the new O. 6 r. 7(2) and (2A) of RHC requires that an applicant for renewal of a writ must state in his application the information required in sub-rule (2A) thereof, the principles upon which a court acts in considering such an application have not changed. The court must be satisfied that there are good reasons for renewal. (p 657 h)

[5] The plaintiff had within 10 days of the issue of the writ taken active steps to effect service on the first defendant and those efforts continued up to the time the writ was to expire. Having served the writ at the address given by the first defendant and having been told that the first defendant had 'left' that address, it was reasonable of the plaintiff to have made a search at the Registrar of Companies and thereafter attempted service at the new address disclosed by such search, and when that too proved unsuccessful, to enquire from the second defendant's solicitors whether they could accept service on behalf of the first defendant. The plaintiff had clearly shown sufficient and good reasons in its application for renewal of the writ. (p 658 e)

[Application dismissed.]

Case(s) referred to:

Battersby & Ors v. Anglo-American Oil Co Ltd & Ors [1945] 1 KB 23 ***(refd)***
Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***
Lloyd Triestino Societa v. Chocolate Products (M) Sdn Bhd [1978] 2 MLJ 27 ***(refd)***
Porter v. Freudenberg, Kreglinger v. S Samuel & Rosenfeld, Re Mertens Patents [1915] 1 KB 857 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 350
General Clauses Enactment (Pahang) 1897, s. 2
Interpretation Acts 1948 and 1967, s. 3
Rules of the High Court 1980, O. 5 r. 6(2), O. 6 r. 7(1), (2), (2A), O. 9 r. 3, O. 12 rr. 1(2), 4(b), O. 62 rr. 4(1)(a), 5(1)
Sultanate Lands Enactment (Pahang Enactment No 1) 1919, s. 6(i)(b)

For the plaintiff - Alvin Yong; M/s Tan, Yap & Tang
For the 1st defendant - Roland Thomas Tudin; M/s Idris & Co

Reported by WA Sharif

JUDGMENT

Clement Skinner J:

This is the hearing of an application by the first defendant herein to set aside an order made on 24 May 2001 by the senior assistant registrar extending the validity of the plaintiff's writ of summons (together with statement of claim) as well as permitting substituted service of the writ on the first defendant. Consequently, the first defendant says that service of the writ upon it must also be set aside.

The facts leading up to this application are these. On 25 November 2000 the plaintiff commenced this action against the first defendant, a company incorporated in Malaysia under the Companies Act 1965, claiming various amounts of money due under eleven hire-purchase agreements entered into between the first defendant and the plaintiff. The second defendant, a director in the first defendant company, is sued in his capacity as a guarantor to each of the hire-purchase agreements aforementioned.

The address for service of the first and second defendants given in the writ was No. 2A, 2nd Floor, Brooke Drive, 96000 Sibu, Sarawak. According to one Nasir Khan bin Istiar Hussain Khan, who affirmed an affidavit on behalf of the plaintiff in these proceedings, that is the address provided by the first defendant and the second defendant in all the eleven hire-purchase agreements and guarantees, the subject-matter of this suit.

Within about 10 days of the writ herein being issued, that is to say on 5 December 2000, the plaintiff's advocates attempted to effect service of the writ on the first defendant by sending the same by registered post enclosed in a letter addressed to the first defendant at No. 2A, 2nd Floor, Brooke Drive, Sibu, Sarawak. However, the registered letter addressed to the first defendant was returned undelivered to the plaintiff's advocates, with the postal authorities advising the reason for non-delivery as "sudah pindah/left" (see exh. N3(b) to the affidavit of Nasir Khan affirmed on 6 July 2001).

On the writ of summons being returned to the plaintiff's advocates, on 23 February 2001, they conducted another search with the Registrar of Companies (an earlier search conducted on 28 September 1999, having shown the first defendant's registered office as at No. 2A, 2nd Floor, Brooke Drive, Sibu, Sarawak) which revealed that the first defendant had changed the location of its registered office to No. 2A, Ground Floor, Brooke Drive, Sibu, Sarawak. Accordingly, on 3 March 2001 the plaintiff attempted to serve the writ on the first defendant at its new registered address by enclosing the writ and a covering letter in an envelope addressed to it at No. 2A, Ground Floor, Brooke Drive, Sibu, Sarawak, and sending the same to it by registered post. However, the writ of summons was again returned by the postal authorities to the plaintiff's advocates, undelivered, for the reason "sudah pindah/left" (see exh. AY6 of the affidavit of Alvin Yong affirmed on 24 May 2001).

In the meantime, the plaintiff had effected service of a concurrent writ on the second defendant who entered a conditional appearance in this action on 12 May 2001. As the second defendant was a director in the first defendant, the advocates acting for the plaintiff wrote to the advocates acting for the second defendant on 21 May 2001, enquiring from the latter if they had

instructions to accept service of process on behalf of the first defendant as well. In a reply dated that very same day, the advocates acting for the second defendant informed the plaintiff's advocates that they could not reply to the plaintiff's advocates' enquiry as the second defendant was overseas.

The writ herein having been issued on 25 November 2000 and being valid for service within six months thereof only, the plaintiff filed an *ex parte* application to (1) extend the validity of the writ for six months from the date of its expiry; and (2) for an order that service of the writ herein on the first defendant be effected by substituted service by inserting a notice of its issue in one publication of the Sarawak Tribune newspaper. The facts upon which the plaintiff relied in making its application are the same as set out above and were contained in an affidavit affirmed by Mr. Alvin Yong on 24 May 2001 in support of the application.

The plaintiff's application came up for hearing before the senior assistant registrar on 24 May 2001 when it was granted.

The first defendant has come forward to set aside the orders made on 24 May 2001 on the grounds that:

(a) the plaintiff at all material times was aware of the first defendant's registered office at No. 2A, Ground Floor, Brooke Drive, Sibu, Sarawak and there was no necessity whatsoever to effect service of the writ by way of substituted service;

(b) alternatively, the Rules of the High Court 1980 ('the RHC') do not provide for substituted service against a company or a corporation;

(c) even if substituted service is available against a company, the plaintiff has failed to comply with O. 62 r. 4(1) and/or r. 5 RHC and/or Form 135;

(d) the plaintiff had failed to make full and frank disclosure in its *ex parte* application to extend the validity and for substituted service of the writ and there are insufficient grounds to warrant an extension of the validity of the writ of summons.

I now consider each of the above grounds in turn.

With regard to the first defendant's first ground, the complaint is that as it is an incorporated company with a registered office at No. 2A, Ground Floor, Brooke Drive, Sibu, Sarawak, the plaintiff needlessly obtained an order to serve the writ by substituted service when the easiest method for service would be according to O. 62 r. 4(1)(a) ie, by leaving a copy of it at the registered office

of the corporation. The first defendant goes on to argue that although service on a company may be effected by registered post, service of process can also be effected by other means (as set out in O. 62 r. 4 RHC) but the plaintiff has not explained why it did not elect to effect service of the writ through the time tested method of just leaving it at the first defendant's registered office

I regret I find no merit in this argument of the first defendant. In the case of a locally incorporated company, the law allows for at least four modes of service of a writ against it, namely, by leaving a copy of it at the registered office, or by sending a copy of it by registered post addressed to the registered office of the company, or by sending it by registered post to the principal office of the company, or by handing a copy of it to the secretary or director or principal officer of the company. A reading of O. 62 r. 4 RHC and s. 350 of the Companies Act which contain the abovementioned provisions regarding service against a company, show that those provisions regarding the mode of service are alternative to each other and merely directory. Having provided several alternative modes of service against a company, the law has left it entirely to the discretion of a plaintiff to select which of the several modes of service is the most effective and prompt means of effecting service of process and when a plaintiff has so chosen, there can be no question of him having to explain or justify his selection of one mode over the other. In fact, it would be inconsistent with that right of choice if a plaintiff has to do so, as now suggested by the first defendant. The plaintiff here having attempted service by the rules and not succeeding, it cannot be said that the plaintiff had needlessly obtained an order for substituted service. And although the first defendant maintains that its registered office has at all material times been located at 2A, Ground Floor, Brooke Drive, Sibu, Sarawak, the fact remains that the registered letter enclosing the writ which was sent to the first defendant at that address was returned to the plaintiff.

I might as well also say that in my view, a plaintiff is not obliged to exhaust each and every mode of service available against a company before applying for substituted service as a plaintiff has a limited time only within which to effect service under the rules.

I consider next the first defendant's second ground, which is that the order for substituted service against it is invalid as there is no provision in the RHC for service on a company to be by way of substituted service. To appreciate the first defendant's argument, it will be necessary to set out the provisions for substituted service in the RHC.

Order 62 r. 5(1) states:

> If, in the case of any document which by virtue of any provision of these rules is required to be served personally on any **person**, it appears to the Court that it is impracticable for any reason to serve that document personally on that **person**, the Court may make an order in Form 135 for substituted service of that document.

It is the first defendant's contention that the word "person" which appears twice in the rule refers to an individual person only and not to an incorporated company and therefore, substituted service is not available against a company. The first defendant argues that the RHC has expressly separated and distinctively uses "person" from "corporation". According to the first defendant, when the rules intend to refer to either an individual person or company interchangeably, the words used are "plaintiff, "defendant" or "parties" and where the rules intend to refer to a company or corporation, an express use of the word "body corporate" is resorted to. According to the first defendant, an example of this is O. 5 r. 6(2) and O. 12 r. 1(2) RHC which expressly provides that a body corporate may not begin or carry on or enter an appearance to any such proceedings otherwise than by a solicitor – an express use of the words "body corporate".

I regret I find absolutely no merit in the first defendant's contention. One only has to read the rules to see that the word "person" is also used to denote reference to a company. For example, O. 6 r. 3 which deals with what must be indorsed on a writ before it is issued provides by sub-r. (2) that:

> Before a writ is issued in an action brought by a plaintiff who in bringing it is acting by order or on behalf of a **person** resident outside the scheduled territories it must be indorsed with a statement of that fact and with the address of the **person** so resident.

I do not think there can be any doubt that the word "person" appearing in the above sub-rule refers to both an individual person and a company or corporation. Likewise, O. 9 r. 3 which deals with the fixing of a date and time for hearing of a petition provides by sub-r. (2) thereof that:

> unless the court otherwise directs, a petition which is required to be served on any **person** must be served on **him** not less than 7 days before the day fixed for the hearing of the petition.

Again, I do not think there can be any doubt at all that the word "person" appearing in the above sub-rule must refer to a company or corporation as it does to an individual person.

Another reason for rejecting the contention of the first defendant and for holding that the word "person" in O. 62 r. 5(1) RHC includes a reference to a company, is s. 3 of the Interpretation Acts 1948 and 1967 which defines "person" to include "a body of persons, corporate or unincorporated."

Counsel for the first defendant has submitted that it would be wrong to automatically apply the definition in s. 3 of the Interpretation Acts 1948 and 1967 in interpreting O. 62 r. 5(1) RHC as the rule had expressly used the word "person" as opposed to "corporation", and in support of his submission referred to *Kesultanan Pahang v. Sathask Realty Sdn. Bhd.* [1998] 2 CLJ 559. In that case the Sultanate of Pahang brought action to recover certain Sultanate lands which had been leased out to a company (which in turn sub-leased the lands to other parties) on the grounds that as the company was not a natural person nor a subject of the Ruler of Pahang, the lease to it was invalid. The crucial issue for determination before the Federal Court was the true construction of the word "persons" within the context of the phrase "persons not being Malay subjects of the said Ruler", found in s. 6(i)(b) of the Sultanate Lands Enactment (Pahang Enactment No 1) 1919 ('the Sultanate Enactment'). The company urged the court to apply s. 2 of the General Clauses Enactment 1897 of Pahang which defined the word 'person' to mean not only natural but also artificial persons like a company in construing the word "persons" in the Sultanate Enactment. The Federal Court refused to do so as it would be inconsistent with the definition of the word "Malay" as well as repugnant to the term "subjects of the Ruler". In so holding, the Federal Court had this to say about the error made by the learned trial judge in having applied s. 2 of the interpretation legislation:

> It is important to appreciate that in its ordinary signification the word "person" must necessarily mean a natural person. It is only under s. 2 of the interpretation legislation that its meaning has been extended to include artificial person. With respect, I am of the view that if the learned judge had considered the circumstances in which the word "person" was used in the context of s. 6(i) he would have discovered the restricted meaning of the word assigned and intended by the legislature. His Lordship ought to consider in greater depth the repugnancy or inconsistency proviso in s. 2 of the interpretation legislation before insisting on the application of the general definition of the word so as to avoid the pitfall of making such application mandatory as if it was without any proviso.

I do not think what was said in *Kesultanan Pahang* can be of any assistance to the first defendant here. I do not think that if the word "person" is interpreted to include reference to a company, such interpretation would be inconsistent with or repugnant to the context in which the word is used in O. 62 r. 5(1) RHC. In my judgment, the use of the word "person" in that sub-rule is not

indicative of an intention to confine the application of the rule to a natural person only. The object and reason behind O. 62 r. 5(1) is to make possible service by an alternative method where it is impracticable to effect service by the conventional methods stated in the rules. Therefore, when considering whether or not substituted service should be available, it is not the character of the party to be served ie, whether that party is a natural person or an incorporated body, but the impracticability of service that is important.

In *Porter v. Freudenberg, Kreglinger v. S. Samuel & Rosenfeld, Re Mertens Patents* [1915] 1 KB 857 it was held, *inter alia*, that the intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings (at p. 888 per Lord Reading CJ). If that be the intention, and since a "defendant" may be either a natural person or company, there can be no good reason to restrict substituted service only to defendants who are natural persons and not available in respect of defendants which are companies since the very purpose behind substituted service is that it is a means by which any defendant will probably get to hear of the proceedings.

I now turn to consider the first defendant's third ground which is that even if substituted service is available against a company, the "Notice of Substituted Service" which the plaintiff caused to be published in accordance with the order of 24 May 2001 was invalid as the plaintiff had failed to comply with O. 62 r. 5, in that, it notified the first defendant that it had 10 days to enter an appearance in this action which is "contrary to the 20 days time frame provided by the court in the said writ of summon."

I regret I find no substance in this complaint of the first defendant. The writ of summons issued out of this registry on 25 November 2000 states a time frame of 10 days for the first defendant to enter appearance in this action, and therefore there is absolutely no basis for the first defendant to say that the court had provided 20 days for appearance in the writ of summons and neither is there any basis for the first defendant's complaint that the plaintiff had on its own volition fixed a time frame of 10 days for appearance in the notification published in the newspapers. The plaintiff's *ex parte* application for substituted service is exhibited as 'N1' to Nasir Khan's affidavit of 29 August 2001 and it is clear that the application for substituted service was in respect of the original writ dated 25 November 2000 and therefore the notice correctly stated 10 days for the first defendant's appearance. The first defendant also claims that under O. 12 r. 4(b) RHC it was entitled to 20 days from date of service to enter appearance, but has not given any reasons why that should be so. That sub-rule states that in Sabah or Sarawak a defendant whose

place of residence or whose registered office or place of business is not within the Division or Residency in which is situated the registry out of which the writ of summons was issued, is entitled to 20 days after service of the writ to enter an appearance. However, the address for service of the first defendant as stated in the writ shows that its registered address is within the Sibu Division in which the registry of this High Court is situated and therefore, the first defendant is entitled to only 10 days to enter an appearance after service of the writ.

With that I turn to consider the fourth ground relied on by the first defendant which is that, since 22 September 2000 when O. 6 r. 7(1) and (2) RHC was amended pursuant to P.U.(A) 342, the period during which a writ remains valid for service has been reduced from 12 months to 6 months which amendment, according to the first defendant, is aimed at preventing indolence by requiring a plaintiff to expedite service of process on a defendant. However, it is the first defendant's complaint that the plaintiff's application for extension of the validity of the writ herein had:

(a) failed to set out any reasons or acceptable reasons as to why the plaintiff did not effect service on the first defendant within six months of its issue; and

(b) failed to make full and frank disclosure in its *ex parte* application to extend the validity of the writ.

With regard to the first defendant's complaint that the plaintiff had not shown any good reasons for an extension of the writ, the new O. 6 r. 7(2) and (2A) now requires any party applying for an extension to

(i) make the application before the expiry of the writ,

(ii) show by affidavit evidence that efforts have been made to serve the defendant within one month of the date of issue of the writ, and

(iii) that subsequent to the first effort, other efforts have been made to effect service.

Although the rules now require that an applicant for renewal of a writ must state in his application the information required in sub-r. (2A), do not think the principles upon which a court acts in considering such an application have changed. In *Battersby & Ors. v. Anglo-American Oil Co. Ltd. & Ors.* [1945] 1 KB 23, Lord Goddard had this to say on the matter of renewal of a writ (at p. 32):

> We conclude by saying that, even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order.

What was said by Lord Goddard in *Battersby*'s case was approved of and applied in our jurisdiction by the Federal Court in *Lloyd Triestino Societa v. Chocolate Products (M) Sdn. Bhd.* [1978] 2 MLJ 27. The court must therefore be satisfied that there are good reasons for a renewal.

Reverting to the facts disclosed in the plaintiff's application for extension of the validity of the writ, it had, as a first step towards the exercise of the jurisdiction given by the new O. 6 r. 7(2A), provided the information required by that sub-rule. I have already, in setting out the facts leading up to this application, said what the efforts made by the plaintiff to effect service of the writ within one month of its issue and thereafter consisted of. They show that the plaintiff had within 10 days of the issue of the writ taken active steps to effect service on the first defendant and that those efforts continued up to the time the writ was to expire. I find it reasonable and acceptable that, having served the writ at the address given by the first defendant in the contracts entered into between the parties and being advised by the postal authorities that the first defendant had "left" that address, the plaintiff should undertake another search with the Registrar of Companies and thereafter attempt service at the new address disclosed by such search, and when that proved unsuccessful also, to enquire from advocates who had in the meantime appeared for the second defendant who was also a director in the first defendant, whether they had instructions to accept service on behalf of the first defendant as well. In my judgment, the plaintiff has shown sufficient and good reasons in its application for renewal of the writ.

The first defendant has complained that the plaintiff, in going about making those efforts at service, had let periods of inactivity creep in, such as, for example, the period between 5 December 2000 (when first attempt at service was made) and 23 February 2001 (when the second attempt at service was made) and 21 May 2001 (when enquiry was made with the advocates acting for the second defendant). I find no merit in this complaint. Of course there were those intervening periods between attempts at service but the case must be looked at as a whole and all the circumstances considered and from what

I have earlier described, this is not a case where after the issue of the writ the plaintiff had sat on it or withheld service of it or had done nothing or very little to effect service of it on the first defendant; rather, the facts show that the plaintiff had taken active steps at effecting service and in addition to what the plaintiff's advocates had done regarding searches and service, the plaintiff had tried to ascertain through its own officers at its branch office at Sibu, whether the first defendant was at the given address. The plaintiff certainly cannot be described as indolent, as the first defendant has attempted to do.

With regard to the first defendant's complaint that the plaintiff had been guilty of not making full and frank disclosure when it obtained the order to extend the validity of the writ on an *ex parte* basis, I find no substance in this complaint. The first defendant's real complaint on this ground seems to be that the plaintiff has not offered any explanation for the plaintiff's inactivity between the attempts at service, but as I have already pointed out I have not found that to be so and there were good reasons given by the plaintiff to explain why the writ was not served within six months of its issue.

For all the above reasons, I dismiss the first defendant's application with costs to the plaintiff.